

REMARKS

This paper is presented in response to the Office Action. By this paper, claims 20 and 23 are amended and new claim 30 is added. Claims 1-30 are now pending in view of the aforementioned new claim.

Reconsideration of the application is respectfully requested in view of the above amendments to the claims and the following remarks. For the Examiner's convenience and reference, Applicants' remarks are presented in the order in which the corresponding issues were raised in the Office Action.

I. General Considerations

Applicants note that the remarks presented herein have been made merely to clarify the claimed embodiments from elements purported by the Examiner to be taught by the cited reference. Such remarks, or a lack of remarks, are not intended to constitute, and should not be construed as, an acquiescence, on the part of the Applicants: as to the purported teachings or prior art status of the cited references; as to the characterization of the cited references advanced by the Examiner; or as to any other assertions, allegations or characterizations made by the Examiner at any time in this case. Applicants reserve the right to challenge the purported teaching and prior art status of the cited references at any appropriate time.

In addition, the remarks herein do not constitute, nor are they intended to be, an exhaustive enumeration of the distinctions between any cited references and the claimed invention. Rather, the distinctions identified and discussed herein are presented solely by way of example. Consistent with the foregoing, the discussion herein is not intended, and should not be construed, to prejudice or foreclose contemporaneous or future consideration, by the Applicants, of additional or alternative distinctions between the claims of the present application and the references cited by the Examiner, and/or the merits of additional or alternative arguments.

II. Claim Rejections Under 35 U.S.C. § 112, First Paragraph

The Examiner rejects claims 2, 21 and 23 under 35 U.S.C. § 112, first paragraph, on the grounds that the disclosure does not adequately describe the claimed subject matter, "graphing byte density over time." Applicant respectfully disagrees.

In the Response to Arguments section of the Office Action, the Examiner acknowledged Applicants' citation to various parts of the application, including a histogram depicted in Figure 3, to provide further context for the aforementioned claim terms. *Office Action* at 11. The Examiner alleged, however, that the histogram of Figure 3 fails to further explain the claim terms because "[t]he axes are not

labeled, no units are given, and nothing about the graph is shown other than stating that the graph shows graphing ‘byte density over time’.” *Id.*

The axes of the histogram in Figure 3 are described in the disclosure as “time along the horizontal axis and bytes along the vertical axis.” See p. 13, ¶ [0029]. Therefore, based on Figure 3 and its accompanying description, the meaning of the phrases “byte density” and “graphing byte density over time” would be readily apparent to one of ordinary skill in the art. In this regard, Applicant submits that examination of the claims using the definitions that the Examiner has created is improper, and the claims must instead be examined as written by Applicant and as interpreted in light of the specification.

With the foregoing points in view, Applicants submit that it is clear that the claimed subject matter is adequately described in the specification, and the 35 U.S.C. § 112 rejection of claims 2, 21 and 23 should accordingly be withdrawn.

In connection with the foregoing, Applicant has submitted herewith a Replacement Sheet that includes corresponding modifications to Figure 3 of the application.

III. Claim Rejections Under 35 U.S.C. § 103

The Examiner has rejected claims 1-6, 9-11 and 13-29 under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 6,965,574 to *Cook et al.* (“*Cook*”) in view of U.S. Patent No. 6,356,256 to *Leftwich* (“*Leftwich*”). The Examiner has also rejected claims 7 and 8 under 35 U.S.C. 103(a) as being unpatentable over *Cook* and *Leftwich* in view of U.S. Patent No. 6,580,959 to *Mazumder* (*Mazumder*). Finally, the Examiner has also rejected claim 12 under 35 U.S.C. 103(a) as being unpatentable over *Cook* and *Leftwich* in view of U.S. Patent No. 6,577,323 to *Jamieson et al.* (*Jamieson*).

Applicants respectfully traverse the rejections and submit that, for at least the reasons set forth below, the rejection of claims 1-6, 7-8, 9-11, 12 and 13-29 should be withdrawn.

a. claims 1-6, 9-11, and 13-18

Applicant notes at the outset that the rejection of claim 1 is a verbatim restatement of the rejection of that claim set forth in the Office Action mailed March 10, 2006. Moreover, the Examiner has largely failed to address the deficiencies in that rejection that were identified by the Applicant in Applicant’s paper mailed July 10, 2006 (“Applicant’s July 10 Paper”).

For example, in that paper, Applicant noted that the Examiner had completely failed to identify which elements purportedly disclosed in *Cook* are believed by the Examiner to correspond with the elements of claim 1. *Applicant’s July 10 Paper* at 12-13. In response to that contention of the Applicant, the Examiner provides no analysis or evidence but, instead, simply makes the statement that “It would be known to one of ordinary skill in the art what elements of the Figure 3 of Cook fulfill the claimed

limitations.” *Office Action* at 4, 12. However, this statement is not evidence of a correlation, but simply a conclusion that a correlation exists. Thus, not only has the Examiner simply repeated the previous rejection without demonstrating any specific correlation between *Cook* and the rejected claims, but the Examiner has also failed to set forth any analysis or evidence whatsoever in support of the assertion that such a correlation exists.

In general, such an approach to examination clearly inhibits the advancement of prosecution inasmuch as the lack of specificity and clarity in the rejection impairs the ability of the applicant “... to provide evidence of patentability and otherwise reply completely at the earliest opportunity.” See *MPEP* § 706. Moreover, the Examiner has advanced no authority in support of the proposition, implicit in the rejections, that “one of ordinary skill in the art,” and not the Examiner, has the burden to show how the claim limitations are met by the cited references. It should be noted that the foregoing points are germane as well to the other claim rejections made by the Examiner.

As another example, Applicant previously noted that the Examiner appeared to be relying on personal knowledge in alleging that “in *Leftwich*: Figure 4 the graph contains tabs for usage statistics and burst management. These would be relating specifically to network traffic...” and Applicant accordingly requested an affidavit pursuant to 37 CFR 1.104(d)(2). See *Applicant’s July 10 Paper* at 13. In response to this contention by the Applicant however, the Examiner simply makes the conclusory statement that “Also one of ordinary skill in the art would know in *Leftwich*: Figure 4 the graph contains tabs for usage statistics and burst management. These would be relating specifically to network traffic.” *Office Action* at 4, 12. Again, not only has the Examiner simply repeated the previous rejection without demonstrating any specific correlation between *Leftwich* and the rejected claims, but the Examiner has also failed to set forth any analysis or evidence whatsoever in support of the assertion that such a correlation exists.

With respect to the foregoing examples, Applicant notes that it is well established that “In rejecting claims for want of novelty or for obviousness, the examiner must cite the best references at his or her command. When a reference is complex or shows or describes inventions other than that claimed by the applicant, the particular part relied on must be designated as nearly as practicable. The pertinence of each reference, if not apparent, must be clearly explained and each rejected claim specified.” 37 CFR 1.104. *Emphasis added.* Moreover, “[t]he goal of examination is to clearly articulate any rejection early in the prosecution process so that the applicant has the opportunity to provide evidence of patentability and otherwise reply completely at the earliest opportunity.” *MPEP* § 706. Applicant respectfully submits that the foregoing discussion makes clear that the Examiner has failed to comply with these requirements.

With regard to the failure of the Examiner to specifically address the foregoing, and other, limitations of the rejected claims, Applicant respectfully submits that if the origin of teachings and

motivation set forth for the proposed combinations are believed by the Examiner to be present in the references, then Applicant requests that this origin be set forth as suggested by MPEP 2144.08 III which states, “[w]here applicable, the finding should clearly articulate which portions of the reference support any rejection. Explicit findings on motivation or suggestion to select the claimed invention should also be articulated in order to support a 35 U.S.C. 103 ground of rejection. *Dillon*, 919 F.2d at 693, 16 USPQ2d at 1901; *In re Mills*, 916 F.2d 680, 683, 16 USPQ2d 1430, 1433 (Fed. Cir. 1990). Conclusory statements of similarity or motivation, without any articulated rationale or evidentiary support, do not constitute sufficient factual findings.” *Emphasis added.*

Not only has the Examiner failed to comply with the aforementioned requirements in connection with the examination of claim 1, but Applicant respectfully notes that the Examiner has failed to comply with these requirements in connection with the rejections of other claims as well. For example, in rejecting claim 2, the Examiner has stated only that “Claim 2 is rejected using the same rationale as claim 1.” *Office Action* at 5. *Emphasis added.* However, the Examiner has failed to specifically address the additional limitations set forth in claim 2. Thus, insofar as the Examiner has failed, as exemplified by the treatment of claim 2, to specifically address every limitation of each rejected claim, Applicant submits that the Examiner has not complied with established examination guidelines. Applicant respectfully submits, moreover, that even if the “rationale” underlying the rejection of each claim is the same, as the Examiner asserts, the similarity of such rationale neither discharges the burden of the Examiner to consider the specific language of each claim, nor grants the Examiner the latitude to simply ignore the plain language of the claims in examining and rejecting the claims. Moreover, the Examiner has failed to cite any authority to the contrary. Finally, Applicant notes that the foregoing considerations are germane as well to the rejections of claims 5-6, 8, 10-11, 16-23 and 24-29, inasmuch as each of those claims has been rejected solely based on a “rationale” purported by the Examiner to be similar to that expressed in connection with the rejection of another claim or claims.

In light of the foregoing discussion, Applicant respectfully submits that the Examiner has failed to establish a *prima facie* case of obviousness with respect to claim 1, at least because the Examiner has not established that the cited references, when combined in the purportedly obvious fashion, teach or suggest all the limitations of claim 1. *MPEP* § 2143. Applicant thus respectfully submits that the rejection of claim 1 should be withdrawn.

By virtue of their dependence from independent claim 1, dependent claims 2-6, 9-11 and 13-18 each require all the limitations of claim 1. As discussed above however, the Examiner has failed to establish that the references, when combined, teach or suggest all the limitations of claim 1. For at least these reasons,

Applicant submits that the Examiner has failed to establish a *prima facie* case of obviousness with respect to dependent claims 2-6, 9-11 and 13-18, and the rejection of those claims should accordingly be withdrawn.

b. claims 19-29

Turning now to claims 19 and 23, the Examiner has rejected those claims “using the same rationale as claim 1.” Inasmuch as the rejection of claim 1 is defective for at least the reasons set forth herein, Applicant respectfully submits that the rejection of claims 19 and 23 likewise lacks an adequate foundation and should accordingly be withdrawn.

Applicants previously noted, moreover, that claims 19 and 23 are not the same as each other, or the same as claim 1 and the Examiner has failed to even assert, much less establish, that any of the cited references, alone or in combination, teach or suggest all of the limitations actually recited in claims 19 and 23. As one example, the Examiner has failed to even assert, much less establish, that any of the cited references discloses the claim 19 limitation “. . . the histogram comprising a first part . . . and a second part . . .” In the Response to Arguments section of the Office Action, the Examiner merely asserted that “[i]t would be known to one of ordinary skill in the art what elements of the Figure 3 of Cook fulfill the claimed limitations.” *See* Office Action, p. 14. Applicants respectfully disagree, at least in part because Figure 3 of *Cook* does not appear to depict a histogram at all. Moreover, the Examiner has failed to establish that *Leftwich* remedies the deficiencies of *Cook*.

In addition, as to claim 23, the Examiner has taken Official Notice that “a top-level folder for organizing data fields into a file structure, along with the naming of the files, folders, etc. that are associated with the file structure, would be obvious to a person of ordinary skill in the art.” *See* Office Action, p. 7-8. The Examiner cited U.S. Patent No. 6,112,024 to *Almond et al.* (“*Almond*”) as an evidentiary reference, asserting that “Almond teaches the top-level folder file structure.” *See* Office Action, p. 14 (citing *Almond* at Figures 7A-7C, col. 46, ll. 15-26 and col. 47, ll. 15-50). Even if *Almond* teaches the claimed file structure, which Applicants do not concede, the Examiner has nonetheless failed to establish the existence of any motivation to combine *Almond* with *Cook* and *Leftwich* in a manner that would result in the claimed invention. Accordingly, for this additional reason, the Examiner has failed to establish a *prima facie* case of obviousness with respect to claim 23.

Claims 20-22 depend from claim 19, and claims 24-29 depend from claim 23. By virtue of their dependence from one of independent claims 19 or 23, dependent claims 20-22 and 24-29 each require all the limitations of their respective independent claims, either 19 or 23. As discussed above, the Examiner has failed to establish that the references, when combined, teach or suggest all the limitations of claims 19 and 23. For at least this reason, Applicants submit that the Examiner has failed to establish a *prima facie* case of

obviousness with respect to claims 20-22 and claims 24-29, and the rejection of those claims should accordingly be withdrawn.

Applicants also note that, with regard to claims 9, 13 and 15, it appears that the Examiner is relying on personal knowledge as a basis for the rejection of those claims. Particularly, the Examiner has simply stated that:

“The system locates the files when it needs to access them for processing and displaying. Therefore, the system must contain indicators to locate the files it is using.” (referring to claim 9);

“The original files were taken from the network monitoring computer and used at the graphical user interface of the user computer to generate the histogram. If the specific files or data is requested that is not at the user computer the network monitoring computer is still fully capable of providing data.” (referring to claim 13); and

“If the system can store the data it also will be able to open the stored files. The original files were taken from the network monitoring computer and used at the graphical user interface of the user computer to generate the histogram. If the saved file opens and specific files or data that is requested is not at the user computer the network monitoring computer is still fully capable of providing data.” (referring to claim 15).

Office Action at 6-7.

However, the Examiner has not identified any portion of *Leftwich* or *Cook* in support of those assertions. Nor has the Examiner identified any references or other materials as being obvious to combine with the purported teachings of *Cook* and/or *Leftwich*, despite Applicants' previous request for an Examiner affidavit that specifically identifies such references. In the Response to Arguments section of the Office Action, the Examiner merely asserted that each of the above statements “would have been known to one of ordinary skill in the art.” *See* Office Action, pp. 12 and 13.

Applicants respectfully disagree and, pursuant to 37 C.F.R. 1.104(d)(2), hereby renew the request for an Examiner affidavit that: (i) specifically identifies any and all reference(s), other than those that have been specifically cited by the Examiner, upon which the obviousness rejection of claims 9, 13 and 15 is based; and (ii) provides complete details concerning the reasoning and analysis of the Examiner concerning those references as those references are purported to apply to the rejection of claims 9, 13 and 15. Finally, please note that this request for an affidavit pursuant to 37 C.F.R. 1.104(d)(2) remains in force throughout the prosecution of this case unless expressly withdrawn by the Applicant.

c. claims 7, 8 and 12

As noted above, the Examiner has rejected claims 7, 8 and 12 as being unpatentable over *Cook*, *Leftwich*, and in further view of *Mazumder*. Claims 7, 8 and 12 depend from claim 1. By virtue of their dependence from independent claim 1, dependent claims 7, 8 and 12 each require all the limitations of independent claim 1. As discussed above in connection with claim 1 however, the Examiner has not established that the combination of limitations of claim 1, and therefore claims 7, 8 and 12, is taught or suggested by the purportedly obvious combination of *Cook* and *Leftwich*. Moreover, the Examiner has not established that this defect is remedied by *Mazumder*.

Moreover, with specific reference now to the claim 12 rejection, Applicants note that the Examiner appears to be relying on personal knowledge by referencing the rejection to claim 7, which relied on personal knowledge. Particularly, the Examiner has simply stated that “[a]n indicator of data location is already part of the data file . . . [t]he data plot can then be color coded according to data location.” Notwithstanding these assertions, the Examiner has not identified any portion of *Leftwich*, *Cook* or *Jamieson* in support of those assertions. Nor has the Examiner identified any references or other materials as being obvious to combine with the purported teachings of *Cook* and/or *Leftwich* and/or *Jamieson*, despite Applicants’ previous request for an Examiner affidavit that specifically identifies such references. In the Response to Arguments section of the Office Action, the Examiner merely asserted that “it would have been known to one of ordinary skill in the art that an indicator of data location is already part of the data file and that the data plot can then be color coded according to data location.” See Office Action, p. 15.

Applicants respectfully disagree and, pursuant to 37 C.F.R. 1.104(d)(2), hereby renew the request for an Examiner affidavit that: (i) specifically identifies any and all reference(s), other than those that have been specifically cited by the Examiner, upon which the obviousness rejection of claim 12 is based; and (ii) provides complete details concerning the reasoning and analysis of the Examiner concerning those references as those references are purported to apply to the rejection of claim 12. Finally, please note that this request for an affidavit pursuant to 37 C.F.R. 1.104(d)(2) remains in force throughout the prosecution of this case unless expressly withdrawn by the Applicant.

In view of the foregoing, Applicants respectfully submit that the Examiner has failed to make out a *prima facie* case of obviousness with respect to claims 7, 8 and 12, at least because the Examiner has failed to establish that the references, when combined, teach or suggest all the limitations of claims 7, 8 and 12. Applicants thus respectfully submit that the rejection of claims 7, 8 and 12 should be withdrawn.

IV. New Claim 30

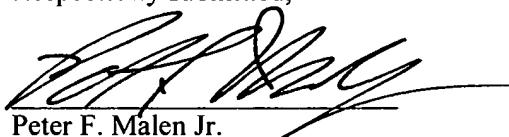
By this paper, Applicants have added new independent claim 30. Support for claim 30 can be found, for example, in the application at pages 15 and 16 (paragraphs [0033] and [0034]) and Figure 3. Claim 30 is believed to be in allowable condition.

CONCLUSION

In view of the discussion and amendments submitted herein, Applicants respectfully submit that each of the pending claims 1-30 is now in condition for allowance. Therefore, reconsideration of the rejections is requested and allowance of those claims is respectfully solicited. In the event that the Examiner finds any remaining impediment to a prompt allowance of this application that could be clarified in a telephonic interview, the Examiner is respectfully requested to initiate the same with the undersigned attorney.

Dated this 21ST day of February 2007.

Respectfully submitted,



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ANNOTATED SHEET

3 / 4

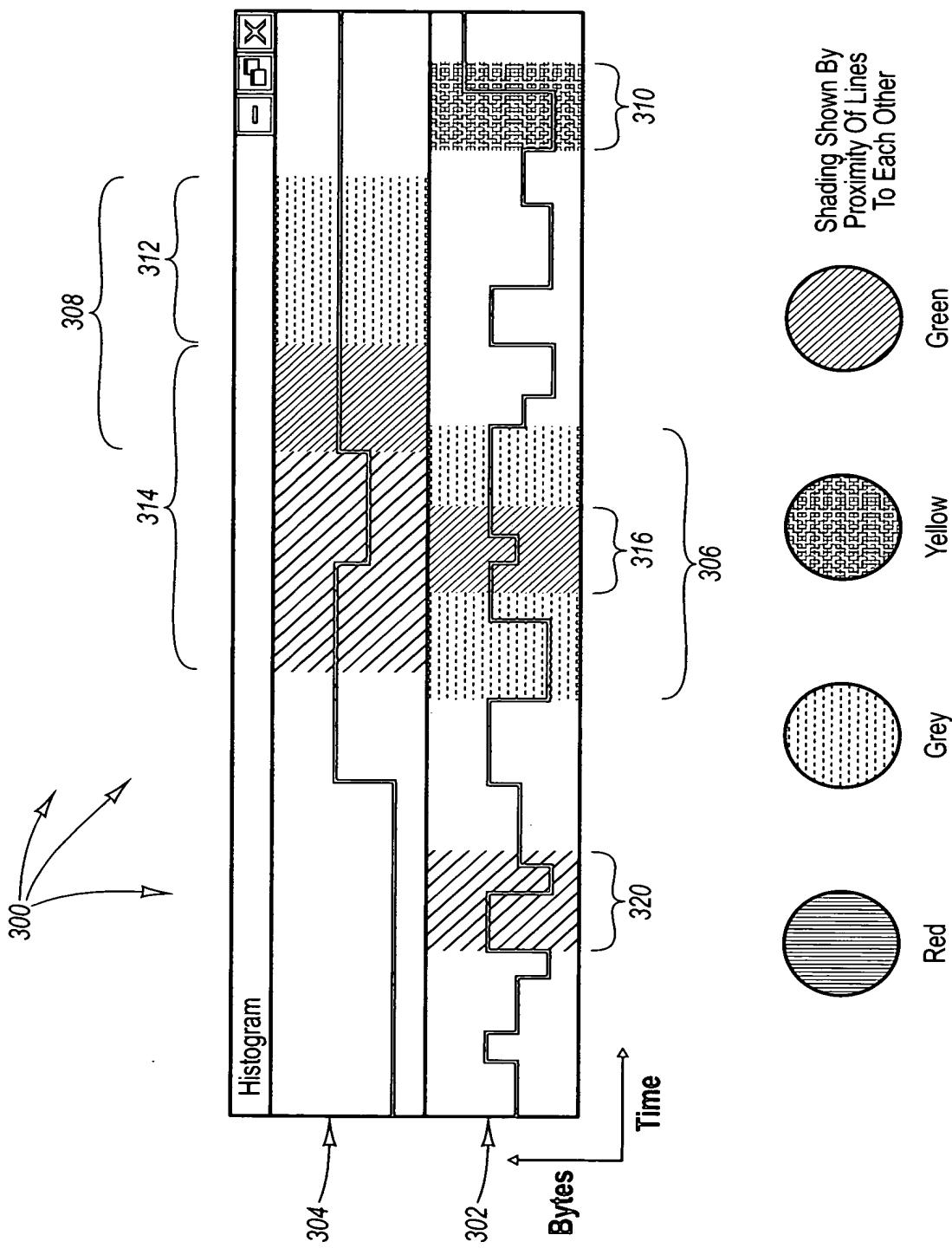


Fig. 3

Application No. 10/702,408
Docket No. 15436.176.1
Reply to Office Action mailed September 21, 2006

AMENDMENTS TO THE DRAWINGS

The attached replacement sheets of drawings include changes to Figure 3. Replacement Sheet 3, which includes Figure 3, replaces the original sheet including Figure 3.

Attachments: Replacement Sheet 3

Annotated Sheet 3